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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

THE STATE OF ARIZONA, Petitioner

vs.

JEFFREY LYNN IKIRT, Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ARIZONA

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QUESTIONS PRESENTED FOR REVIEW

I. DID A VIOLATION OF GRIFFIN V. CALIFORNIA, 380 U.S. 609 (1965), OCCUR WHERE THE PROSECUTOR, IN RESPONDING TO DEFENSE STATEMENTS ABOUT A HEARSAY OBJECTION, MERELY SAID TO THE JUDGE, "I THINK MR. IKIRT [THE DEFENDANT] IS HERE", WITHOUT MENTION OF THE DEFENDANT'S FAILURE TO TESTIFY (WHICH HAD NOT YET OCCURRED), AND WITHOUT EVER SUGGESTING THAT AN ADVERSE INFERENCE SHOULD BE DRAWN FROM THE FAILURE TO TESTIFY?

II. IF THERE WAS A GRIFFIN VIOLATION IN THIS CASE, SHOULD IT NOT HAVE BEEN FOUND HARMLESS BEYOND A REASONABLE DOUBT, BASED ON THE INNOCUOUS NATURE OF THE REMARK, THE CIRCUMSTANCES SURROUNDING THE MAKING OF IT, AND THE WEIGHTY EVIDENCE OF THE DEFENDANT'S GUILT?

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The original decision in the case, by the Arizona Court of Appeals, was by "Memorandum Decision", and hence (pursuant to Rule 111 of the Rules of the Arizona Supreme Court) was not to be published at all. The two decisions by the Arizona Supreme Court were designated as "Opinions", and thus will be published, but neither has actually appeared as of the filing of this Petition. Since the Court of Appeals decision and the Supreme Court's first decision did not reach the issue raised by this Petition, only the final Opinion, involving the issue raised here, is reproduced as an appendix to the Petition.

JURISDICTION OF THIS COURT

The Arizona Supreme Court's opinion reversing Ikirt's conviction was filed on January 17, 1989. The State (petitioner herein) filed a timely Motion for Reconsideration by mailing it on February 1, 1989. That Motion was denied by the Arizona Supreme Court on March 14, 1989, in an action of which the parties were notified by

order dated March 15, 1989. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(3).

It might be questioned whether the Arizona Supreme Court decided the case on independent state grounds (thereby depriving this Court of jurisdiction), because of the references to the Arizona Constitution, an Arizona statute, and previous Arizona cases. (See Appendix 2, Reproduced Slip Opinion, at original page 7.) However, this Court has held that a state court decision must "clearly and expressly" state that the decision is based on "bona fide separate, adequate and independent [state] grounds" in order to preclude review by this Court. Michigan v. Long, 463 U.S. 1032, 1041 (1983). It is a mode of analysis consistently applied since Long was decided. See Harris v. Reed, ___ U.S. ___, 109 S.Ct. 1038, 1042 and n. 7 (1989).

That the Arizona Supreme Court understands the rule of Michigan v. Long, and knows how to comply with it when it so desires, is indicated by, for example, State

v. Ault, 150 Ariz. 459, 466, 724 P.2d 545, 552 (1986), where Long is cited and an express statement of independent state grounds is given.

However, that was not done in the present case. The most direct statement of the holding relies exclusively on this Court's decision in Griffin v. California, 380 U.S. 609 (1965):

> We have concluded that the case must be reversed because the prosecutor improperly commented on the defendant's failure to testify. Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965).

(Appendix 2, Reproduced Slip Op. at 5.) Similarly, in characterizing Ikirt's claim, the Arizona Supreme Court said:

> Relying on Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965), the defendant contends that the prosecutor's comment violates his fifth amendment right against self-incrimination. In Griffin, the United States Supreme Court held that any comments by a prosecutor about the failure of the defendant to testify violates a defendant's right against self-incrimination.

(Id. at 7.) Although a portion of the Arizona Constitution and a state statute are

noted, it is said merely that those provisions "also provide such protection to criminal defendants in Arizona," (id.), not that they were being relied upon as an independent basis for the decision in the case. A similar situation was confronted in Long, where the state court's decision concluded,

> "We hold, therefore, that the deputies' search of the vehicle was proscribed by the Fourth Amendment to the United States Constitution and art. 1, § 11 of the Michigan Constitution."

(463 U.S. at 1037, n. 3.) That was not enough to preclude federal review.

Moreover, although the Arizona Supreme Court did refer to some prior Arizona decisions as supporting its conclusion in this case (Appendix 2, Reproduced Slip Op. at 7-8), that does not mean that an independent state basis exists. All of those cases rely jointly on the Fifth Amendment as explicated by Griffin v. California, Art. 2 § 10 of the Arizona Constitution, and Ariz.Rev.Stat.Ann. § 13-117(B) (or its predecessor, old § 13-163(B)). The Arizona courts have

repeatedly held that Art. 2 § 10 is equivalent to the Fifth Amendment, and provides no greater protection than does the Fifth Amendment. See State v. Marsin, 82 Ariz. 1, 4, 307 P.2d 607 (1957); State v. White, 102 Ariz. 162, 163, 426 P.2d 796, 797 (1967); State v. Fendler, 127 Ariz. 464, 481, 622 P.2d 23, 40 (Ct.App. 1980); State v. Superior Court (Gilliland), 149 Ariz. 601, 602, 721 P.2d 149, 150 (Ct.App. 1986). Further, the Arizona Supreme Court found an equivalency between the protection afforded by the statute and the Fifth Amendment protection applied in Griffin v. California. See State v. Pierson, 102 Ariz. 90, 91, 425 P.2d 115, 116 (1967). In short, the Arizona cases, constitution, and statutes relied upon are all equivalent to the Fifth Amendment, and are not expressly designated as a ground of decision independent of Griffin, so there is no jurisdictional bar to the Court granting certiorari in this case.

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT V.

No person ... shall be compelled in any criminal case to be a witness against himself...

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Jeffrey Ikirt was charged with burglary, arson, and criminal damage in excess of $10,000. The charges stemmed from the May 25, 1984, burning of the home of the Lozanos, parents of the woman from whom he had recently undergone an extremely bitter divorce. The defense called as a witness Ikirt's own mother, Gladys Perotti, and attempted to elicit from her a statement that Ikirt supposedly made to her on May 24, the day before the fire. This attempt drew a hearsay objection from the prosecutor:

> Q. And did it have to do with him having visited the Lozano residence on that day, being Thursday, May 24th?
>
> A. Yes.
>
> MR. BREW: Objection, Your Honor, that is clearly hearsay because it refers specifically to the content of the communication. Even if it's answered "Yes" or "no," it still refers to the content of the communication.
>
> MR. BEHRENS: Well, Your Honor. I'm merely trying to lay foundation for the excited utterance exception to the hearsay rule.
>
> MR. BREW: Your Honor, I don't believe you can get the communication in in the guise of laying the foundation.

I think Mr. Ikirt is here.

THE COURT: The objection is sustained.

MR. BEHRENS: Your Honor, could we approach the bench?

THE COURT: Yes. You'll have to. Bring the court reporter.

(R.T. Vol. VI. at 130; emphasis added.) Ikirt's counsel then made a motion for a mistrial, based on the underlined comment supposedly being a reference to Ikirt's failure to testify, but the motion was denied. (Id. at 131-32.) The defense was then permitted to elicit from Mrs. Perotti the statement in question. (Id. at 133.)[1]

The defense presented a total of four witnesses on Ikirt's behalf, but he did not testify himself. Although the prosecutor's two closing arguments cover 65 pages of transcript, he never referred either to the portion of Mrs. Perotti's testimony which drew the objection or to Ikirt's failure to

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1 A larger excerpt of the transcript, including the discussion at the bench, is included in Appendix 1 to this Petition.

testify. (R.T. Vol. IX. at 9-52, 104-27.) The judge did not instruct the jurors that they could draw an adverse inference from Ikirt's failure to testify. (Id. at 127-35.) On the contrary, the jury was told:

> The law does not require a defendant to prove his innocence. He is presumed by law to be innocent. This means the state must prove all of its case against the defendant. The state must prove the defendant guilty beyond a reasonable doubt.
>
> No verdict of guilty may be based on mere suspicion, probability or supposition.

(Id. at 133.) Indeed, the trial judge offered to give a specific instruction explaining the defendant's right not to testify, but the defense attorney rejected the offer, for tactical reasons. (R.T. Vol. VIII. at 29-30.)

Ikirt was convicted as charged. Although a number of issues were raised in his appeal, including the prosecutor's remark noted above, the Arizona Court of Appeals reversed the convictions on a wholly different ground, the admissibility under Arizona law of references to polygraph testing. When the

State sought review of this decision in the Arizona Supreme Court, it was overturned. However, this action left unresolved the other issues that had been raised by the appeal, but which had not been dealt with by the Arizona Court of Appeals, a fact that was pointed out in a motion for reconsideration filed on Ikirt's behalf. Upon further consideration the Arizona Supreme Court issued a second opinion, reversing the convictions because of a perceived violation of Griffin v. California, 380 U.S. 609 (1965). (Appendix 2.) It is that decision which petitioner is urging this Court to review.

REASONS FOR GRANTING THE WRIT

IA. IN APPLYING GRIFFIN V. CALIFORNIA TO THIS CASE, IN WHICH NEITHER THE PROSECUTOR NOR THE JUDGE ACTUALLY COMMENTED ON THE DEFENDANT'S FAILURE TO TESTIFY, AND NEITHER PROSECUTOR NOR JUDGE SUGGESTED TO THE JURY THAT ANY INFERENCE SHOULD BE DRAWN ADVERSE TO THE DEFENDANT, THE ARIZONA SUPREME COURT HAS DECIDED A FEDERAL QUESTION IN A WAY WHICH CONFLICTS WITH DECISIONS OF THIS COURT SUCH AS UNITED STATES V. ROBINSON, WHICH MAKE CLEAR THAT GRIFFIN IS TO BE CONSTRUED NARROWLY.

Ikirt argued, and the Arizona Supreme Court agreed, that the prosecutor's isolated statement to the judge in arguing an evidentiary objection, "I think Mr. Ikirt is here", constituted a violation of Griffin v. California, 380 U.S. 609 (1965). In so doing the Arizona Supreme Court seems to have taken the position that virtually any reference to a defendant's presence at trial becomes a Griffin violation if he does not testify, but that goes far beyond anything in either Griffin itself or this Court's subsequent application of it. In Griffin, after the evidence was concluded and the defendant had not testified, there was both a prosecutorial argument directed at the jury emphasizing that such silence should be inferred to indicate guilt, and a jury instruction that although a defendant had a constitutional right not to testify, his failure to do so allowed the jury to draw an unfavorable inference. This was held to be a violation of the Fifth Amendment.

> [C]omment on the refusal to testify is a remnant of the "inquisitorial system of criminal justice," which the Fifth Amendment outlaws. It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly.... What the jury may infer, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another.

(380 U.S. at 614; citations omitted.) It was only the creation of such pseudo-evidence of guilt that concerned this Court.

> [The comment rule] is in substance a rule of evidence that allows the State the privilege of tendering to the jury for its consideration the failure of the accused to testify. No formal offer of proof is made as in other situations; but the prosecutor's comment and the court's acquiescence are the equivalent of an offer of evidence and its acceptance.

(380 U.S. at 613.) It therefore announced its formal holding to be that the Fifth Amendment "forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." (380 U.S. at 615, 85 S.Ct. at 1233.) This is actually a rather narrow rule, the necessary corollary to which

is that a remark that does not suggest that silence is evidence of guilt is not a Griffin violation.

That Griffin is to be read narrowly rather than broadly has been indicated in subsequent decisions by this Court. The Court refused to apply Griffin to prison disciplinary proceedings and summarized its previous holding by stating that, "Griffin prohibits the judge and prosecutor from suggesting to the jury that it may treat the defendant's silence as substantive evidence of guilt." Baxter v. Palmigiano, 425 U.S. 308, 319 (1976). In Lakeside v. Oregon, 435 U.S. 333 (1978), the petitioner attacked the trial court's giving of an instruction that the jury should not draw any adverse inference from a defendant's failure to testify, arguing that this was a "comment" on his silence that violated the Griffin holding. This Court refused to give Griffin such an absurdly broad application.

> It is clear from even a cursory review of the facts and the square holding of the Griffin case that the

> Court was there concerned only with adverse comment, whether by the prosecutor or the trial judge -- "comment by the prosecution on the accused's silence or instruction by the court that such silence is evidence of guilt." Id., at 615, 85 S.Ct., at 1233. The Court reasoned that such adverse comment amounted to "a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." Id., at 614, 85 S.Ct., at 1232.... The Court concluded in Griffin that unconstitutional compulsion was inherent in a trial where prosecutor and judge were free to ask the jury to draw adverse inferences from a defendant's failure to take the witness stand. But a judge's instruction that the jury must draw no adverse inferences of any kind from the defendant's exercise of his privilege not to testify is "comment" of an entirely different order.

(436 U.S. at 338-39; emphasis in original.)

Thus, a proper Griffin inquiry seeks to determine whether a comment is actually adverse to the defendant, by making silence into evidence of guilt, or whether the remark is "of an entirely different order", that contains no impermissible compulsion or penalty. "The Griffin case stands for the proposition that a defendant must pay no court-imposed price for the exercise of his

constitutional privilege not to testify." Carter v. Kentucky, 450 U.S. 288, 300-01 (1981).

The limited reach of Griffin has continued to be reiterated in this Court's more recent cases. In a concurring opinion in United States v. Hasting, 461 U.S. 499 (1983), Justice Stevens concluded that the prosecutor's argument to the jury about "what the defendants did not do" in their case was not a Griffin violation at all. "Under Griffin ... it is improper for either the court or the prosecutor to ask the jury to draw an adverse inference from a defendant's silence." (461 U.S. at 515.) The majority opinion noted that Justice Stevens might well have been correct that the comment was permissible (461 U.S. at 506, n. 4), but disposed of the case on the basis that the clear harmlessness of the comment made the exercise of federal court supervisory power inappropriate.

The most recent case is also the most helpful, namely, United States v. Robinson,

___ U.S. ____, 108 S.Ct. 864 (1988). There the defense counsel had said in closing argument that the prosecution was unfair because the government had denied the defendant the opportunity to explain his actions, so the trial judge permitted the prosecutor to respond that the defendant had had several such opportunities, and could have explained from the witness stand anything that he wanted to. The Court of Appeals reversed the conviction on the basis of Griffin, but this Court reinstated it, holding that Griffin had not been violated. No less than three times the opinion states that Griffin should not be read broadly. (108 S.Ct. at 868, 869, 870.) The Court focused on the nature of the comment, taken in its context.

> The Court of Appeals and respondent apparently take the view that any "direct" reference by the prosecutor to the failure of the defendant to testify violates the Fifth Amendment as construed in Griffin. We decline to give Griffin such a broad reading, because we think such a reading would be quite inconsistent with the Fifth Amendment, which protects against compulsory self-incrimination. The

> Griffin court addressed prosecutorial comment which baldly stated to the jury that the defendant must have known what the disputed facts were, but that he had refused to take the stand to deny or explain them. We think there is considerable difference for purposes of the privilege against compulsory self-incrimination between the sort of comments involved in Griffin and the comments involved in this case.

(108 S.Ct. at 868-69.) After citing Baxter v. Palmigiano and Lakeside v. Oregon, supra, for the proposition that Griffin prohibits using a defendant's silence as "substantive evidence of guilt", the Court continued:

> In the present case it is evident that the prosecutorial comment did not treat the defendant's silence as substantive evidence of guilt, but instead referred to the possibility of testifying as one of several opportunities which the defendant was afforded, contrary to the statement of his counsel, to explain his side of the case. Where the prosecutor on his own initiative asks the jury to draw an adverse inference from a defendant's silence, Griffin holds that the privilege against compulsory self-incrimination is violated. But where as in this case the prosecutor's reference to the defendant's opportunity to testify is a fair response to a claim made by defendant or his counsel, we think there is no violation of the privilege.

(108 S.Ct. at 869.) The importance of

context was reinforced by a footnote stating that, "a reference to the defendant's failure to take the witness stand may, in context, be perfectly proper". (Id., n. 5.) The Court concluded,

> [I]t is important that both the defendant and the prosecutor have the opportunity to meet fairly the evidence and arguments of one another. The broad dicta in Griffin to the effect that the Fifth Amendment "forbids ... comment by the prosecution on the accused's silence," 380 U.S., at 615, 85 S.Ct., at 1233, must be taken in the light of the facts of that case. It is one thing to hold, as we did in Griffin, that the prosecutor may not treat a defendant's exercise of his right to remain silent at trial as substantive evidence of guilt; it is quite another to urge, as defendant does here, that the same reasoning would forbid the prosecutor from fairly responding to an argument of the defendant by adverting to that silence. There may be some "cost" to the defendant in having remained silent in each situation, but we decline to expand Griffin to preclude a fair response by the prosecutor in situations such as the present one.

(108 S.Ct. at 870.)

Thus, this Court has made it clear that Griffin is not to be broadly applied, and that not all comments are improper. Rather, the remarks must be examined in context to

see whether they are adverse, in the sense that they amount to a suggestion to the jury that the defendant's silence amounts to evidence of guilt, or whether they are merely appropriate responses to defense arguments or other circumstances of the case. If there was no violation of Griffin in Robinson, a fortiori there was none here: the prosecutor's remark was to the judge, not to the jury, so it was, at worst, indirect; it was merely a fair response to an evidentiary argument made by the defense counsel; and it cannot reasonably be construed as suggesting that the jury should treat the defendant's failure to take the stand (which hadn't even occurred yet) as substantive evidence of his guilt. The Arizona Supreme Court's application of Griffin to the wholly different facts of this case seriously distorts the rule and the reasoning of Griffin; it clearly "decided a federal question in a way in conflict with applicable decisions of this Court", and has thereby created a situation where a grant of

certiorari is appropriate. Supreme Court Rule 17.1(c).

IB. THE ARIZONA SUPREME COURT'S ERRONEOUS APPLICATION OF GRIFFIN V. CALIFORNIA WARRANTS GRANTING OF CERTIORARI, BOTH BECAUSE IT INDICATES THE POSSIBLE BEGINNING OF A TREND TOWARD MISUNDERSTANDING AND MISAPPLICATION OF GRIFFIN, AND BECAUSE IT CREATES A CONFLICT WITH AT LEAST ONE OTHER STATE COURT OF LAST RESORT, THAT FOUND GRIFFIN INAPPLICABLE TO SIMILAR FACTS.

Given the limited size of this Court's docket and the overwhelming number of petitions filed, it is obvious that this Court cannot grant certiorari in every case where some lower court has misapplied one of its decisions, even in so egregious a manner as occurred here. However, the Arizona Supreme Court's error in this case takes on added import from two factors. First, the Arizona Supreme Court evidently is not alone in its serious misunderstanding of Griffin. The Arizona Supreme Court relied on a case with similar facts called Ex Parte Tucker, 454 So.2d 552 (Ala. 1984), which arrived at a similar conclusion. One case is an aberration; two cases can create a trend. It

therefore seems important to stem the tide of misunderstanding before it increases in strength, and many more legitimate convictions are wrongfully reversed.

The second factor germane to granting certiorari is that at least one other court, also on similar facts, has reached a correct conclusion, and held that no Griffin violation occurred. See Barnes v. State, 630 P.2d 1221 (Nev. 1981). Thus, there has developed the very situation envisioned by Supreme Court Rule 17.1(b) -- "[A] state court of last resort has decided a federal question in a way in conflict with another state court of last resort..." Certiorari should therefore be granted, to resolve this conflict and to clarify the appropriate reach of Griffin.

II. IN FINDING THE PERCEIVED GRIFFIN ERROR IN THIS CASE TO BE PREJUDICIAL, THE ARIZONA SUPREME COURT HAS CLEARLY MISUNDERSTOOD THE HARMLESS ERROR DOCTRINE ANNOUNCED IN CHAPMAN V. CALIFORNIA.

The case in which this Court held that constitutional errors could be harmless

itself involved a Griffin violation, that ultimately was found to be harmful. The standard announced in Chapman v. California, 386 U.S. 18, 24 (1967), is that the reviewing court "must be able to declare a belief that it was harmless beyond a reasonable doubt." The error in Chapman was not harmless because the combination of the prosecutor's argument and the jury instruction "continuously and repeatedly impressed the jury" with the negative inference to be derived from the defendant's silence; the situation was characterized as "a machine-gun repetition of a denial of constitutional rights, designed and calculated to make petitioners' version of the evidence worthless". (386 U.S. at 26-27.) How the test should be applied to a Griffin violation was further indicated in Anderson v. Nelson, 390 U.S. 523, 524 (1968):

> We agree with Judge Ely that comment on a defendant's failure to testify cannot be labeled harmless error in a case where such comment is extensive, where an inference of guilt from silence is stressed to the jury as a basis of conviction, and where there is evidence that could have supported acquittal.

In the present case, the comment was not extensive, an inference of guilt from silence was never even mentioned to the jury (let alone stressed to it), and the defense evidence (as will be discussed below) was quite weak. Other factors noticed by this Court as supporting a conclusion that an argument is harmless include: statements to the jury by the prosecutor that his arguments are not evidence; cautionary or curative instructions given; ambiguity of the remark; length of the trial; and whether the remark was isolated or repetitious -- in short, the totality of the circumstances. See Donnelly v. De Christoforo, 416 U.S. 637, 644-47 (1974). A similarly wide-ranging inquiry was specifically applied to alleged Griffin error in United States v. Hasting, supra.

An examination of the record in this case encompasses two categories of relevant factors -- the circumstances surrounding the remark itself, and the weight of the evidence. Consideration of the first category reveals the following:

1. Mr. Brew's remark did not actually touch on whether Ikirt testified, but simply pointed out that he was present in the courtroom. If "No prejudice can result from seeing that which is already known", United States ex rel. Stahl v. Henderson, 472 F.2d 556, 557 (5th Cir. 1973), cert. denied, 411 U.S. 971, quoted in Estelle v. Williams, 425 U.S. 501, 507 (1976), it is difficult to find prejudice in a remark pointing out what the jury had seen through many days of trial.

> [A] court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations.

Donnelly v. De Christoforo, 416 U.S. at 647. Moreover, the defense case was not yet finished, so it remained an open question whether Ikirt would testify. It presumes a great deal to find a comment on failure to testify in a remark made before the defense case was concluded so that the defendant might well still be put on the witness stand.

2. The isolated remark, to the extent that a reference to even a potential failure to testify can be found in it, certainly was inadvertent. That the prosecutor was momentarily confused in the heat of trial about the specific limitations relating to one out of several dozen hearsay exceptions is hardly surprising; even the trial judge initially sustained the objection, allowing the testimony to come in only after the matter had been talked through for several minutes. This classes the remark with the "improvisation" referred to in Donnelly (id.) rather than with the "machine-gun repetition of a denial of constitutional rights, designed and calculated" to devalue the defense case found in Chapman.

3. The jury cannot be presumed to have paid much attention to the comment. This was six days into a trial filled with objections and rulings, and they had been instructed from the very beginning both that lawyer talk is not evidence and that evidentiary rulings were matters they should not be concerned

with. (R.T. Vol. II. at 58-59, 61.) By this time the jurors undoubtedly were "tuning out" to a large degree the objections and responses flying back and forth, and what they did hear they had ample time to forget because the case was not submitted to them until April 9, six days later. (R.T. Vol. IX.)

4. The testimony the defense sought to elicit eventually was permitted to come out.

5. During the voir dire process all the jurors had assented to the proposition that a defendant is perfectly free not to testify, and that his failure to take the witness stand cannot be held against him. (R.T. Vol. II. at 39-41.) This brief, indirect, and isolated remark surely could not have done away with that understanding.

6. Not only was a curative instruction not requested but the defense specifically rejected the offer of a closing instruction on a defendant's right not to testify. (R.T. Vol. VIII at 29-30.) This Court refused to assume "that the jurors will totally

disregard the instruction, and affirmatively give weight to what they have been told not to consider at all." Lakeside v. Oregon, 435 U.S. at 340, 98 S.Ct. at 1095. Therefore, the defense itself must bear the blame for not permitting dissipation of whatever prejudice there might have been, by virtue of its objection to the curative instruction.

That the prosecutor's remark was completely harmless is further demonstrated by the overwhelming weight of evidence against Ikirt. The gist of the charges against him was that he had broken into the home of Pete and Lupe Lozano on the night of May 25, 1984, and set it on fire. The testimony at trial left no doubt of the validity of those charges.

Martha, daughter to the Lozanos, was married to Ikirt, but filed for a divorce in June 1983, and moved into her own apartment in Tucson. (R.T. Vol. III. at 41-42, 46.) Ikirt threatened that he would do everything he could to keep her from succeeding financially, so that she "would have to come

crawling back" and not divorce him. (Id. at 77.) There followed a steady stream of direct harassment by Ikirt, including threats to kill Martha, supplemented by mysterious vandalism that seemed to be linked to him. (Id. at 42-49, 71-74, 77-80.) During this time period he also threatened to damage her parents' property, and indicated a wish to kill her father, apparently because he blamed her parents for the divorce. (Id. at 46.) Finally, Martha left Tucson on March 11, 1984, and moved into her parents' home outside of Sierra Vista. (Id. at 51.) However, Ikirt still had visitation rights with the children, and used those meetings and the telephone as methods for further harassment. (Id.)

On March 29, 1984, Ikirt picked up the children as if for visitation, but only drove down the block to the home of a neighbor of the Lozanos, Mack Bankston, and telephoned Martha from there. (Id. at 52-53.) When it began to get dark, Martha walked down the street to get the children and got into an

argument with Ikirt. (Id. at 53-54.) During this episode he slapped Martha on the top of the head, an act also witnessed by Mr. Bankston, who tried to separate them and calm the situation. (Id. at 54, 179-80.) When Pete Lozano came up Ikirt argued with him in extremely foul language for almost half an hour. (Id. at 180-81.) During this episode both Martha and Mr. Bankston heard Ikirt threaten to kill her and to burn the house down; Mr. Bankston also recalled Ikirt indicating that he had friends who would do it for him. (Id. at 55-56, 182, 219.) Pete and Lupe Lozano heard something similar. (Id. at 91-92, 150.) On April 5, 1984, after Martha refused to talk to him, he broke down the front door of the house, struck Pete Lozano on the forehead hard enough to draw blood, and told Lupe Lozano she'd be next. (Id. at 56-58, 92-93, 150-53.) On April 19, 1984, at the final hearing on the divorce, Ikirt suggested that he'd kill the entire family. (Id. at 68-69, 126-28.) Indeed, he was continually talking to Mr. Bankston (with

whom he worked at Ft. Huachuca), making threats of getting even with the Lozano family. (Id. at 184-85.) After the threats on April 19 the entire Lozano household moved to Mesa out of fear about what Ikirt might do. (Id. at 69-70.)

On May 1, 1984, another neighbor, Mrs. Branham, saw Ikirt at the empty house. He took an object around to the Northeast corner of the house, where he was out of her view, returned a few minutes later, and left. (R.T. Vol. IV. at 10-11.) When she investigated she found the screen slashed (though still in place) and the lock on the window broken. (Id. at 12-13.) Lupe Lozano had told Mrs. Branham that Ikirt had threatened to burn the house. (Id. at 38.) On the night of May 25 still another neighbor, Mr. Rojas, saw Ikirt's truck driving up and down a road near the Lozano house, between about 8:00 and 8:45 p.m., with its lights off. (Id. at 54-64, 69, 75.) When it left, it turned on Highway 82 toward Tombstone. (Id. at 79-80, 116-18.) Then, at

about 8:45 p.m., he noticed a strange glow briefly appear and then disappear inside the Lozano house. (Id. at 64, 67.) He hesitated for about 15 minutes, not knowing what to do, and then asked Mrs. Branham to call the police, at about 9:00 p.m. (Id. at 15, 64-67.)

The deputy had some difficulty locating the house, but by the time he found it, it clearly was on fire, and the dispatcher was so informed at 9:18 p.m. (Id. at 137-38.) The screen from the Northeast window was now on the ground, its clean condition showed that it had not been in place during the burning of the house, and the window with the broken lock was standing open. (R.T. Vol. II. at 90, 95-98.) It was plain that the fire had been intentionally set, because there were three distinct points of origin (a bed in a bedroom, and a couch and a chair in the livingroom), and no accidental causes could be found for any of them. (Id. at 106, 139, 214-16; Vol. V. at 108, 119-20.) A plastic clock left a clean spot on the

kitchen wall (showing that it survived the fire for a little while) before it softened and fell to the floor, stopping at 8:40; thus the fire had to have been started sometime before 8:40 p.m. (Vol. V. at 155-56, 173.)

Ikirt was living in Tombstone with his mother and step-father, Gladys and Joe Perotti. (R.T. Vol. VI. at 126-27, 135.) Highway 82 between the fire location and Tombstone is a good, unpatrolled road, so that someone driving at 60 mph could be in Tombstone within about 17 minutes -- or sooner if he went faster. (R.T. Vol. IV. at 146-47.) The first time any neutral person saw Ikirt in Tombstone was about 9:35 p.m. (R.T. Vol. V. at 95-98.) When he was questioned by a deputy later that night he gave three conflicting versions of his whereabouts during the afternoon and evening. (R.T. Vol. IV. at 161-66, Vol. V. at 10-13.) The sole defense offered was the effort of his mother to provide an alibi, that he had not left their house until about 8:45 p.m. (R.T. Vol. VI. at 138-39.) That alibi was

effectively destroyed by the father's statement given on the very night of the fire, that Ikirt left the house at about 8:00 p.m. (R.T. Vol. VII. at 135-38.) Moreover, Ikirt's own account of his movements was substantially rebutted by the testimony of bar personnel who did not see him at the places and times he had stated to the police. (R.T. Vol. V. at 89-91, 93, 140-43, 145-46, 147-50.)

The most damaging evidence of Ikirt's guilt was his own statements. First, on the morning after the fire he went to two friends to get them to lie about being with him the previous evening, and in doing so he told the men he had set the fire, with one Tommy Gilbert, and that he was to pay Gilbert $400. (R.T. Vol. VI. at 23-28.) One of the men, Michael Lennon, actually testified at trial that he had been with Ikirt and the second man, Jim Curry, for awhile before 9:00 p.m. on the night of the fire. (R.T. Vol. VII. at 13-17.) However, Lennon was impeached on a number of details of his testimony: Lynn

Curry testified that her husband Jim told her he was not with Ikirt that night. (R.T. Vol. VI. at 43.) Lennon attempted to imply that he had taken and passed a polygraph test, when he actually backed out of taking it. (R.T. Vol. VII. at 22-23, 27-28.) His attempt to make it appear that the police had obtained his agreement to take the polygraph early in the morning when he was half-asleep in the hospital and disoriented (id. at 26-27) was directly contradicted by the detective. (Id. at 141-42.) Moreover, Lennon had an obvious reason to shield Ikirt because Tommy Gilbert, Ikirt's paid accomplice, was Lennon's half-brother. (Id. at 16-17.)

Ikirt's second inculpatory statement was made to Mr. Bankston, on the first working day after the fire had occurred.

> A He came out to the shredder building again and with little bits of material for destruction.
>
> After he finished, again he came out and wanted to know what I knew about the Lozano house burning. And at this time I was so fine-tuned to what was going down the last two

months, that I told him if he had burned the house, that I hoped he had burned, he would burn.

And he said: Well, I didn't do it. And I said: Well, if you had a friend do it, I hope he burns. And he says: They won't catch him.

Q Was that the end of the conversation?

A No.

Doggone.

Ikirt at that time stated that he had worked in a fire department and he knew what they, the fire department looked for and such things as this.

(R.T. Vol. III. at 186-87; see also pp. 222-23.) Finally, when Ikirt's sister-in-law accused him of destroying the house he did not deny it, but merely said that he knew he had a lot of problems to work out. (Id. at 137.)

The weight of evidence against Ikirt was absolutely overwhelming. The remark made by the prosecutor was isolated, innocuous, and mitigated by the procedural circumstances discussed earlier. Therefore, even if the comment did violate Griffin (which is denied), it certainly was harmless beyond a

reasonable doubt, and the Arizona Supreme Court compounded its Griffin misunderstanding by concluding that the perceived error was prejudicial. Certiorari should be granted to provide guidance on what constitutes harmless error in the context of a claimed Griffin violation.

CONCLUSION

The Supreme Court of Arizona's decision in this case seriously distorts the meaning of Griffin v. California, creates a conflict with the supreme court of another state, and finds prejudice in a manifestly harmless circumstance. This Court should vindicate and clarify its holdings in Griffin, United States v. Robinson, and Chapman v. California by granting certiorari in this case, and correcting the errors of the Arizona Supreme Court.

Respectfully submitted,

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The Attorney General

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THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF COCHISE

STATE OF ARIZONA,	)	
	)	
Plaintiff,	)	No. 11486
	)	
vs.	)	
	)	
JEFFREY LYNN IKIRT,	)	
	)	
Defendant.	)	
	)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS
(VOLUME VI)

APPEARANCES:

MR. LINDSAY BREW
ASSISTANT ATTORNEY GENERAL
For the Plaintiff

MR. TONY K. BEHRENS
DESENS, BEHRENS & ROLL
For the Defendant

CAROLYN J. CRANFORD
Court Reporter

Be it remembered that on the 3rd day of April, 1985, the above-entitled matter came on for hearing before the Honorable Richard A. Winkler, Judge, Division II.

BY MR. BEHRENS:

Q. Mrs. Perotti, did -- and this is just a "Yes" or "No" question. Did you talk to Jeff on the late afternoon or evening on Thursday, May 24, 1984?

A. Yes, I did.

Q. And in talking to Jeff, was he excited in what he was indicating?

A. Yes.

Q. And did Jeff indicate to you in an excited manner something having to do with child visitation?

MR. BREW:

Objection, leading. And objection, calls for hearsay.

THE COURT:

Overruled. Answer it 'Yes" or "No," please.

THE WITNESS:

Yes, he did.

BY MR. BEHRENS:

Q. And did it have to do with him having visited the Lozano residence on that day, being Thursday, May 24th?

A. Yes.

MR. BREW:

Objection, Your Honor, that is clearly hearsay because it refers specifically to the content of the communication. Even if it's answered "Yes" or "No," it still refers to the content of the communication.

MR. BEHRENS:

Well, Your Honor, I'm merely trying to lay foundation for the excited utterance exception to the hearsay rule.

MR. BREW:

Your Honor, I don't believe you can get the communication in in the guise of laying the foundation. I think Mr. Ikirt is here.

THE COURT:

The objection is sustained.

MR. BEHRENS:

Your Honor, could we approach the bench?

THE COURT:

Yes. You'll have to. Bring the court reporter.

(The following proceeding took place among court and counsel at the bench.)

[PAGE 131]

THE COURT:

You're not going to get that in on excited utterance.

MR. BREW:

He had to have an unavailable declarant, Your Honor. He's got an available declarant.

MR. BEHRENS:

Your Honor, first of all -- excuse the throat. I'm having trouble whispering.

THE COURT:

Yes.

MR. BEHRENS:

I want to specifically object to Mr. Brew's indication that was calculated to indicate to the jury that Mr. Ikirt is here and that that relates to a possible comment upon a failure to take the stand if he so chooses to. I therefore move for a mistrial on that basis.

MR. BREW:

Your Honor, it's relevant. He's claiming hearsay exception and we have an available declarant and that's one of the considerations.

THE COURT:

Yes. But he, under 803 -- that is

where the declarant is available.

MR. BREW:

The only purpose I have making the statement is to indicate the declarant is available.

THE COURT:

I understand that.

What are you getting into? See, I don't know where we're headed.

MR. BEHRENS:

Okay. Well, first of all I have my motion for mistrial that I think needs a ruling.

[PAGE 132]

THE COURT:

The motion will be denied.

MR. BEHRENS:

Okay. Where we're heading, Your Honor, is that Jeff told her, in an excited manner when he got home, that he had been to the place and that nobody was there, but that the

kid's toys were there and he was concerned that they were gone and wondered when they would be getting back.

MR. BREW:

Your Honor, the purpose of this offering is to suggest that Mr. Ikirt discovered -- didn't know all the time he was going there that they weren't there, and it's solely for the purpose of establishing hearsay. If Mr. Ikirt wants to testify to that, he's free to do so, but he can't get it in this way.

THE COURT:

No. The objection is overruled. I'm going to admit it under 803(3) as his existing mental state at that time.

MR. BREW:

Well, it's not a statement as to existing; he's talking about what he

saw at the house. That's not his existing mental state.

THE COURT:

No. But I'm admitting it for the purpose of showing his mental state the day before the incident.

Overruled. Go ahead.

[PAGE 133]

(The following proceedings took place in open court.)

DIRECT EXAMINATION (CONTINUING)

BY MR. BEHRENS:

Q. Mrs. Perotti, I believe where we left off I was asking you about Thursday, May 24, when Jeff came home to say something about child visitation.

Would you relate to the jury what he indicated at that time?

A. Well, Jeff has visitation rights every Tuesday and every --

MR. BREW:

Excuse me, Your Honor. Non-responsive to the question.

THE WITNESS:

Oh, I'm sorry. I'm sorry.

THE COURT:

The question was: What did he say to you?

THE WITNESS:

Well, he says: Momma, they may come back. He said: I went by and the toys, the children's toys, were there. They haven't completely moved out.

And he was supposed to get them on that following Friday.

FILED
JAN. 17, 1989
DAVID R. COLE
CLERK SUPREME COURT

IN THE SUPREME COURT OF THE STATE OF ARIZONA
En Banc

THE STATE OF ARIZONA,	)	Supreme Court
	)	No. CR-86-0201-PR
Appellee,	)	
	)	Court of Appeals
vs.	)	No. 2 CA-CR 4035
	)	
JEFFREY LYNN IKIRT,	)	Cochise County
	)	Superior No. 11486
Appellant.	)	

SUPPLEMENTAL OPINION

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY
Honorable Richard A. Winkler, Judge

REVERSED AND REMANDED

Robert K. Corbin, Attorney General — Phoenix
by Bruce M. Ferg
Assistant Attorney General
Attorneys for Appellee

Robert Arentz, Cochise County Public Defender — Bisbee
Perry L. Hicks [Former Cochise County Public Defender]
By: Wallace R. Hoggatt
Deputy Cochise County Public Defender
Attorneys for Appellant

HOLOHAN, Justice (Retired)

APPENDIX 2

After this Court issued its opinion vacating the decision of the Court of Appeals and affirming the defendant's conviction, the defendant, Jeffrey Lynn Ikirt, filed a motion for reconsideration contending that a number of the issues that he had raised on his appeal to the Court of Appeals had not been considered on appeal. We grant the defendant's motion to reconsider so that we may reexamine the case in light of the defendant's contentions.

[PAGE 2]

A brief review of the procedural history of the appeal is necessary to understand the present posture of the case. The defendant filed an appeal with the Court of Appeals after his conviction in the superior court. In that appeal he raised five issues. The Court of Appeals, in a memorandum decision, considered only two of the defendant's issues, reversed the conviction, and ordered a new trial. State v. Ikirt, 2 CA-CR 4035,

filed April 2, 1986. The state filed, pursuant to Rule 31.19(a), Rules of Criminal Procedure, 17 A.R.S.[1] a petition for review raising a single issue: the admissibility of testimony concerning the failure of a witness to take a polygraph examination. The defendant, however, did not file a cross-petition for review to request this court's consideration of the issues left undecided by the Court of Appeals. See Rule 31.19(a).

The primary issue presented in the defendant's motion for reconsideration is whether this court, in a criminal appeal accepted for review on the state's petition, must also consider and decide all the issues raised by a defendant in the Court of Appeals even if a cross-petition for review was not filed.

---

[1] The Arizona Rules of Criminal Procedure will be cited as Rule ___ throughout this opinion.

The Arizona Constitution, article 2 § 24 grants an accused the right to appeal in all cases. Except for cases in which the accused has been given a life sentence or the death penalty, an appeal from a criminal conviction in the superior court is to the Court of Appeals. A.R.S. §§ 12-120.21(A)(1), 13-4031; State v. Shattuck, 140 Ariz. 582, 684 P.2d 154 (1984). Review of the Court of Appeals' decisions by this court is a matter of discretion. Rule 31.20(f). Id., 140 Ariz.

[PAGE 3]

at 584, 684 P.2d at 156.

To invoke the discretionary appellate jurisdiction of this court, the rules of procedure require that a party file an appropriate petition for review or cross-petition for review setting out the issues for which review is sought. Rule 31.19(a) and (c). If this court exercises its discretion and grants review, it will specify the issue or issues which are to be reviewed.

Rule 31.19(f). Although a defendant has the right to an appeal in a criminal case, the appeal must be properly initiated, State v. Williams, 144 Ariz. 487, 698 P.2d 732 (1985); the record on appeal must contain the material to which objection is made, State v. Zuck, 134 Ariz. 509, 658 P.2d 162 (1982); and the defendant must raise and argue the issue relied upon in the appeal. State v. Smith, 125 Ariz. 412, 610 P.2d 46 (1980); State v. Gortarez, 141 Ariz. 254, 686 P.2d 1224 (1984); State v. McCall, 139 Ariz. 147, 677 P.2d 920 (1983). We see no distinction between not raising an issue on appeal and not filing a petition or cross-petition for review -- if an issue is not presented for review, it is waived. We acknowledge that we have never specifically held that the failure to file a cross-petition for review acts as a waiver, but we do so now.

We have taken a similar position on waiver in respect to Rule 32. In State v.

Carriger, 143 Ariz. 142, 692 P.2d 991 (1984), we held that a petitioner had the burden to assert grounds that bring him within the provisions of Rule 32 in order to obtain relief, and a failure to comply with Rule 32 procedure will result in a finding that the petitioner waived his right to present a Rule 32 petition. Id., 143 Ariz. at 146, 692 P.2d at 995.

[PAGE 4]

The necessity for a defendant to file a cross petition for review to preserve the claim of error becomes clearer when the Arizona system is understood. The process of review by this court is part of the appeal process. Unlike the certiorari review procedure followed by the United States Supreme Court and several of the state court systems,[2] a case accepted for

---

[2] Although neither the Rules of Criminal Procedure nor the Rules of Civil Appeal Procedure provide for it, there is no

review by this court is not returned to the Court of Appeals after our decision. This court makes the final determination and issues the mandate to the trial court. See Rule 31.19(g); Rule 24(a)(4), Rules of Civil Appellate Procedure, 17B A.R.S. If this court denies the petition and cross petition for review, the Court of Appeals issues the mandate to the trial court. Rule 31.19(h). This procedure comports with the notion that the court which makes the binding decision should issue the mandate.

---

2 (Continued) impediment that would prevent this court from adopting a certiorari review practice on appeal. Under this court's constitutional power to make rules relative to all procedural matters in any court (Art. 6, § 5(5)), we could adopt such a procedure and leave to the Court of Appeals the responsibility for implementing our decisions. The Civil Practice and Procedure Committee and the Appellate Handbook Committee have submitted proposed changes to the rules governing petitions for review which address the situation presented in this case. The proposed rule changes will be circulated for public comment prior to consideration by this court.

The defendant argues that it would be unfair to deny him his right of appeal because the necessity of filing a cross-petition for review was never clearly announced by this court. We agree. The defendant also reminds us that he is entitled to have the case reviewed by an appellate court for fundamental error. Again we agree. Notwithstanding a defendant's failure properly to pursue an appeal, A.R.S. § 13-4035 has for many years been construed to require [PAGE 5] that the supreme court or appellate court must review the appeal for fundamental error. See Smith v. State, 23 Ariz. 469, 204 P. 1032 (1922) (construing Section 1171, Revised Statutes of 1913, Penal Code, an earlier version of part of A.R.S. § 13-4035); State v. Allen, 140 Ariz. 412, 415, 682 P.2d 417, 420 (1984); State v. Cannon, 148 Ariz. 72, 79, 713 P.2d 273, 280 (1985).

We have, therefore, considered the points

raised by the defendant in his appeal to the Court of Appeals. We note, however, that in future cases, civil or criminal, a party must file a cross-petition for review to preserve an issue for consideration by this court. Failure to file a cross-petition will be deemed a waiver of the issue.

After reviewing the record and the issues raised in the defendant's appeal we find that we need address but one issue which is dispositive of the case. We have concluded that the case must be reversed because the prosecutor improperly commented on the defendant's failure to testify. Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965).

DISCUSSION

The facts concerning the issue arose when the defense called the defendant's mother to the stand. Defense counsel began to ask her several questions about an alleged conversation she had had with the defendant

the day before the fire. The prosecutor made several hearsay objections, stating in open court that the defendant's statements were not admissible hearsay. The defense counsel then asked whether the defendant had told her that he had visited the Logans' [sic] residence that day. The prosecutor again objected on hearsay grounds. The [PAGE 6] following then occurred, in the presence of the jury:

> MR. BEHRENS [defense counsel]: Well, your honor, I'm merely trying to lay foundation for the excited utterance exception to the hearsay rule.
>
> MR. BREW [prosecutor]: Your honor, I don't believe you can get the communication in in the guise of laying a foundation. I think Mr. Ikirt is here.

R.T. Vol. VI. at 130 (emphasis added).

The trial court sustained the objection. Defense counsel asked for a bench conference and the following occurred:

> THE COURT: You're not going to get that in on excited utterance.
>
> MR. BREW: He had to have an unavailable declarant, Your Honor. He's got an available declarant.

* * *

MR. BEHRENS: I want to specifically object to Mr. Brew's indication that was calculated to indicate to the jury that Mr. Ikirt is here and that that relates to a possible comment upon a failure to take the stand if he so chooses to. I therefore move for a mistrial on that basis.

MR. BREW: Your Honor, it's relevant. He's claiming hearsay exception and we have an available declarant and that's one of the considerations.

THE COURT: Yes. But he under 803 -- that is where the declarant is available.

MR. BREW: The only purpose I have making the statement is to indicate the declarant is available.

Id. at 131 (emphasis added). The court denied defense counsel's motion for mistrial.

[PAGE 7]

Relying on Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d (1965), the defendant contends that the prosecutor's comment violates his fifth amendment right against self-incrimination. In Griffin, the United States Supreme Court held that any comments by a prosecutor about the failure

of the defendant to testify violates a defendant's right against self-incrimination. See also State v. Smith, 101 Ariz. 407, 420 P.2d 278 (1966). Article 2, § 10 of the Arizona Constitution and A.R.S. § 13-117(B) also provide such protection to criminal defendants in Arizona. An accused is entitled to be free of any comment, direct or indirect, by design or accident, about a failure to take the stand. State v. Cannon, 118 Ariz. 273, 576 P.2d 132 (1978). Whether the prosecutor's comment is improper depends upon the context in which it was made, and whether the jury would naturally and necessarily perceive it to be a comment on the defendant's failure to testify. State v. Schrock, 149 Ariz. 433, 719 P.2d 1049 (1986). We will not reverse an improper comment unless it is prejudicial. State v. Sullivan, 130 Ariz. 213, 218, 635 P.2d 501, 506 (1981).

The prosecutor's statement in this case

is very similar to that found to be improper in Ex Parte Tucker, 454 So.2d 552 (Ala. 1984). There the defense counsel asked a defense witness what the defendant had told him in a conversation. The prosecutor made a hearsay objection and stated in open court: "She's here, may it please the court. She can tell what she told him." Id. at 553 (emphasis original). Despite the trial court's instruction telling the jury to disregard the statement, the Alabama Supreme Court reversed and remanded stating:

[PAGE 8]

> Clearly, the prosecutor's comments in the case at bar raise the possibility that the jury could have understood them to be a reference to the defendant's failure to testify. In our view, these comments most probably made an indelible impression upon the jury, alerting the jury to the defendant's opportunity to refute the state's case. After such a comment, a defendant must either testify, or admit guilt by silence.

Id. at 553.

Tucker is distinguishable from the

present case only in the addition of the remark, "She can tell what she told him." We do not believe the difference is significant. In this case the prosecutor had already made several hearsay objections and stated that the defendant's statements to his mother were inadmissible hearsay. The jury would naturally and necessarily have understood the prosecutor's statement "Mr. Ikirt is here" to mean that the defendant could take the stand and tell them what he told his mother. See State v. Christensen, 129 Ariz. 32, 39, 628 P.2d 580, 587 (1981). Whether deliberately or inadvertently, the prosecutor's remark not only drew the jury's attention to the exercise of a legitimate constitutional right, but it also put pressure on the defendant to testify. We conclude that this constitutes an improper comment on the defendant's failure to testify. Contra, Barnes v. State, 630 P.2d 1221, 1223 (Nev. 1981) (holding that prosecutor's statement

after hearsay objection that if the defendant "wants to talk, he can get up on the stand and do it," would not "naturally and necessarily" be taken as a comment on the defendant's failure to testify).

The state advances several reasons why the defendant suffered no prejudice from the prosecutor's statements. We find them to be without merit. The state's case was entirely circumstantial. Although the defendant's defense was alibi, he did not testify. Under these circumstances [PAGE 9] we cannot say that the error was not prejudicial to the defendant.

Because of the error in the trial of this case, the previous decision of this court affirming the defendant's conviction is set aside, the judgment of conviction is reversed, and the case is remanded to the superior court for a new trial.

WILLIAM A. HOLOHAN, Justice
(Retired)

CONCURRING:

_____

FRANK X. GORDON, JR., Chief Justice

_____

STANLEY G. FELDMAN, Vice Chief Justice

_____

JAMES DUKE CAMERON, Justice

Justice Moeller did not participate in the determination of this matter.

ORIGINAL

Supreme Court, U.S.
FILED
JUN 9 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT
OF THE
UNITED STATES

October Term, 1988

No. 88-1844

STATE OF ARIZONA,

Petitioner,

v.

JEFFREY LYNN IKIRT,

Respondent.

MOTION FOR LEAVE TO PROCEED IN
FORMA PAUPERIS

Respondent, JEFFREY LYNN IKIRT, pursuant to Rule 46, Supreme Court Rules, asks leave to file the attached brief in opposition to the petition for a writ of certiorari without pre-payment of costs and to proceed in forma pauperis. The Respondent was represented by the Cochise County Public Defender's Office, of which the undersigned is a member, on appeal to the Court of Appeals and the petition for review to the Arizona Supreme Court. This representation was under a court appointment and Mr. Ikirt proceeded as an indigent in the State of Arizona before the Arizona Court of Appeals and Supreme Court.

RESPECTFULLY SUBMITTED this 9th day of June, 1989.

ROBERT ARENTZ
Cochise County Public Defender

BY: _____
ROBERT ARENTZ
Public Defender
and
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AFFIDAVIT

STATE OF ARIZONA)
)ss.
County of Cochise)

I, JEFFREY LYNN IKIRT, being first duly sworn, upon my oath, depose and state that I am the Respondent in the above-entitled cause; that in support of my motion to proceed without being required to repay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said case or to give security therefor; and that I believe I am entitled to redress.

I further swear:

1. That I am not currently employed, nor have I been employed since I was incarcerated by the State of Arizona as a prisoner in the Arizona Department of Corrections.

2. That within the last twelve months I have not received any income from any business, profession or self-employment, nor do I receive any interest, dividends, or other source of income.

3. That I have no checking nor savings account and the only cash with which I am possessed is of a minimal amount.

4. That I do not own any real estate, nor do I own any stocks, bonds, notes, automobiles, or other property of any value and I have no liquid assets whatsoever except as set forth in the preceding paragraph.

5. That I have no one who is dependent upon me for support.

I understand that a false statement or answer to any of the questions in this affidavit will subject me to penalties for perjury.

JEFFREY LYNN IKIRT

SUBSCRIBED AND SWORN to before me this 7th day of June, 1989.

Notary Public

My Commission Expires:

My Commission Expires Aug. 26, 1992

AFFIDAVIT

STATE OF ARIZONA)
)ss.
County of Cochise)

I, ROBERT ARENTZ, having first been duly sworn, state under oath that I am appointed counsel for the Respondent in this case; that in support of this motion to proceed without being required to pre-pay fees, costs, or to give security therefor, I state that Respondent was allowed to proceed in forma pauperis in the Arizona Court of Appeals and Supreme Court. The Respondent is currently unemployed and has just been released from the Arizona Department of Corrections in the custody of his mother.

I understand that a false statement in this affidavit will subject me to penalties for perjury.

ROBERT ARENTZ

SUBSCRIBED AND SWORN to before me this 9th day of June, 1989.

Notary Public

My Commission Expires:

My Commission Expires Aug. 26, 1992

IN THE SUPREME COURT
OF THE
UNITED STATES

October Term, 1988

No. 88-1844

STATE OF ARIZONA

Petitioner,

vs.

JEFFREY LYNN IKIRT,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ARIZONA

BRIEF IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

A. SHOULD THIS COURT GRANT CERTIORARI IN THIS CASE WHEN THE ARIZONA SUPREME COURT BASED ITS DECISION UPON THE INDEPENDENT STATE GROUND OF STATE STATUTE?

B. SHOULD THIS COURT GRANT CERTIORARI IN THIS CASE WHEN THE ARIZONA SUPREME COURT BASED ITS DECISION UPON THE INDEPENDENT STATE GROUND OF ARTICLE 2, SECTION 10 OF THE ARIZONA CONSTITUTION?

C. WAS THE ARIZONA SUPREME COURT CORRECT IN FINDING THAT THE PROSECUTOR'S COMMENT ON THE DEFENDANT'S ABILITY TO TESTIFY CONSTITUTED FUNDAMENTAL ERROR?

D. WAS THE ARIZONA SUPREME COURT CORRECT IN FINDING THAT THE PROSECUTOR'S COMMENT ON THE DEFENDANT'S ABILITY TO TESTIFY WAS NOT HARMLESS ERROR?

STATEMENT OF THE CASE

The Respondent will rely on facts as announced in the Arizona Supreme Court decision reported in State v. Ikirt, ____ Ariz. ____, 770 P.2d 1159 (1987) and appended to the Petition for Writ of Certiorari as Appendix 2. Where appropriate, in argument, Respondent will supplement those facts.

ARGUMENT

A. THIS COURT SHOULD NOT GRANT CERTIORARI IN THIS CASE BECAUSE THE ARIZONA SUPREME COURT BASED ITS DECISION UPON THE INDEPENDENT STATE GROUND OF STATE STATUTE.

Michigan v. Long, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983) held that when,

> "a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so."

Id at 1040-1041, 103 S.Ct. at 3476. In such a case, this Court will review the state court case unless it is made clear "by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached." Id.

The threshold question in this case is whether the Arizona Supreme Court's decision rested primarily on federal law or was so interwoven with federal law that the state law basis for the decision is unclear. Only then does the requirement for a clear statement come into play.

In the present case, the Arizona Supreme Court reached the result it did on the basis of the Arizona Constitution and an applicable state statute. While a similar result may have been

reached under Griffin v. California, 380 U.S. 609 (1965), this does not mean that the Arizona Supreme Court was compelled to hold as it did on the basis of Griffin.

Prior to Griffin, this Court never reached the question whether the federal guarantee against self-incrimination prohibited adverse comment upon a defendant's failure to testify at his trial. Tehran v. United States, 382 U.S. 406, 412, 86 S.Ct. 459, 463 (1966). The reason being that since 1908 this Court refused to impose the Fifth Amendment privilege against self-incrimination on the states and the question never arose in federal court because 18 U.S.C. Section 3481 prohibited adverse comment upon a defendant's failure to testify in a federal criminal trial. Id.

During the period between 1908 and 1965 the question whether the state could comment on a state court defendant's failure to testify was controlled by state law. Adamson v. California, 332 U.S. 46, 67 S.Ct. 1672, 91 L.Ed. 1903 (1947). While some states allowed such comment during that period, Arizona, by statute, consistently prohibited it.

Arizona Revised Statutes (A.R.S.) Section 13-117(B) provides that "(t)he defendant's neglect or refusal to be a witness in his own behalf shall not in any manner prejudice him, or be used against him on the trial or proceedings." This statute has been continuously in effect in Arizona since before statehood. See, Arizona Penal Code 1901, Section 1112; Arizona Penal Code 1913, Section 1229; Arizona Revised Code 1928, Section 5179; Arizona Code 1939, Section 44-2704; and the former A.R.S. Section 13-163.

It is true that the Arizona Supreme Court has observed on occasion that Arizona's statutory protection against adverse comment was raised to the level of a constitutional guarantee after Griffin. See, State v. Fuller, 143 Ariz. 571, 694 P.2d

1185 (1985); State v. Pierson, 102 Ariz. 90, 425 P.2d 115 (1967). Presumably, this is primarily due to language in Griffin which substituted the words "Fifth Amendment" for the words "act" and "statute" in a quotation from Wilson v. United States, 149 U.S. 60, 13 S.Ct. 765, 37 L.Ed. 650 (1893) discussing the federal statute proscribing adverse comment. However, this does not mean that the statutory protection and the federal prohibition against self-incrimination are equivalent.

The proscription against drawing adverse inferences from a defendant's failure to testify is not a necessary corollary of the prohibition against self-incrimination. Commonwealth v. Torres, 17 Mass.App. 676, 461 N.E.2d 1231 (1984). It is a related, but distinct proposition. Id. This is evidenced by the fact that in most jurisdictions, including the federal jurisdiction, the proscription against adverse comment is found in statute. Further, in those jurisdictions in which comment was allowed prior to Griffin it was permissible to inform juries that a defendant had a constitutional right not to testify but that the jury could draw any inference it thought proper from the exercise of that right. People v. Modesto, 42 Cal.Rptr. 417, 398 P.2d 753 (1965); State v. Sandoval, 59 N.M. 85, 279 P.2d 850 (1955).

Griffin expanded the scope of the Fifth Amendment to encompass in large part the terrain previously occupied solely by A.R.S. Section 13-117. The same can be said for Griffin's effect on the federal statute. United States v. Robinson, ____, U.S. ____, 108 S.Ct. 864, 867 n.4 (1988). However, the fact that the Fifth Amendment is now "generally construed in a parallel fashion" with these statutory provisions, see, Id, does not mean that these provisions are equivalent.

The language of A.R.S. Section 13-117 is much broader than

the holding in Griffin. That there is no equivalency of the Arizona statute and the Fifth Amendment is shown in State v. Smith, 101 Ariz. 407, 420 P.2d 278 (1966). The Arizona Supreme Court stated that after Griffin v. California, they are concerned not only with a statutory right under Arizona law, but an individual's constitutional rights as well. The language in State v. Smith clearly and expressly indicates the independence of the separate rights upon which the present decision is based. See also State v. Mata, 125 Ariz. 233, 609 P.2d 48 (1980).

In addition, in State v. Marsin, 82 Ariz. 1, 307 P.2d 607 (1957) the Arizona Supreme Court recognized the differing scope of the statute and the constitutional prohibition against self-incrimination. After discussing the constitutional prohibition, the court went on to discuss the purpose and protection afforded by the statute. While the court found that the statute did not apply to the facts of that case, it is clear from the court's discussion that the two concepts are not equivalent.

In the present case, it appears clear that the prosecutor's comment violated defendant's rights under A.R.S. Section 13-117. Such would have been the Arizona Supreme Court's holding prior to Griffin and even in the absence of any constitutional provision which might also apply. A.R.S. Section 13-117, by itself, is sufficient to support the court's holding. Therefore, the statute provides an independent and adequate state law ground to support the judgment and any intervention by this Court would amount to nothing more than an advisory opinion.

One further point must be made in this regard. This Court recognizes the general rule of judicial restraint that when statutory construction can resolve a case, courts should not decide constitutional issues. New York v. Class, 475 U.S. 106, S.Ct. 960 (1986). Arizona adheres to this rule. State v.

Church, 109 Ariz. 39, 504 P.2d 940 (1973). From the rule, this Court may wish to infer that since the Arizona Supreme Court discussed both statutory and constitutional grounds, the statutory issue was insufficient to resolve the case and therefore the statute could not constitute an independent and adequate state ground. See Class at 108, 106 S.Ct. at 964.

Such an inference does not apply to the facts of this case. While the constitutional prohibition against self-incrimination and the statutory no comment rule are separate concepts, the statute cannot be discussed without considering the constitutional provisions. The statute was adopted to protect the constitutional privilege. Marsin at 4, 307 P.2d at 610. The statute has no place without the constitutional prohibition against self-incrimination. Therefore, the fact that these provisions are discussed in tandem raises no inference that the statute would not resolve this case on its own.

Further, the rule of judicial restraint discussed above has a double-edged effect in this case for the rule applies equally to this Court as it does to a state court. This Court has relied upon that rule to resolve doubts about the independence of state-law decisions in favor of an interpretation that avoids a constitutional question. Black v. Cutter Laboratories, 351 U.S. 292, 76 S.Ct. 824, 100 L.Ed.2d 1188 (1956). In the present case, the Arizona statute is sufficient to resolve the issue and this Court should avoid the constitutional question presented. Such was the Court's practice prior to Griffin when issues concerning adverse comments on a defendant's refusal to take the stand in federal cases was resolved on the basis of the federal statute. See, Bruno v. United States, 308 U.S. 287, 60 S.Ct. 198, 84 L.Ed. 257 (1939).

The Arizona Supreme Court's decision in this case was based

on Arizona law. The decision does not rest primarily on federal law and it is not interwoven with federal law. The decision in this case would have been no different prior to Griffin when federal law would have been inapplicable. From a fair reading of the case it appears that Griffin was introduced into the opinion because the defendant relied on that case in presenting his argument to the court. No other federal authorities are cited in the opinion. Therefore, since federal law is not a significant part of the court's opinion, no statement concerning the compelling nature of the federal law is required. An independent and adequate state law ground supports the Arizona Supreme Court's decision.

B. THIS COURT SHOULD NOT GRANT CERTIORARI IN THIS CASE BECAUSE THE ARIZONA SUPREME COURT BASED ITS DECISION UPON THE INDEPENDENT STATE GROUND OF ARTICLE 2, SECTION 10 OF THE ARIZONA CONSTITUTION.

In Michigan v. Long, 463 U.S. 1082, 103 S.Ct. 3469, 77 L.Ed.2d 1201 (1983), this Court clarified the role of State courts in phrasing independent state grounds. This Court will look to the language of the state court to determine if the decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds.

> "...we merely assume that there are no such grounds when it is not clear from the opinion itself that the state court relied upon an adequate and independent state ground and when it fairly appears that the state court rested its decision primarily on federal law." Michigan v.. Long, 103 S.Ct. at 3477.

As previously discussed, the Arizona Supreme Court's decision was based upon an Arizona statute and Arizona cases interpreting that statute, which predate Griffin v. California. In addition, the Arizona Court based its decision upon Article 2, Sec. 10 of the Arizona Constitution.

In its Petition for Writ of Certiorari, the State argues that Arizona courts have repeatedly held that Article 2, Sec. 10 is equivalent to the Fifth Amendment and provides no greater protection. The cases cited by the Petitioner do not support such a proposition.

State v. White, 102 Ariz. 162, 426 P.2d 796 (1967) states only that the variations of wording in the federal and state constitutions do not lead to different interpretations, not that Article 2, Sec. 10 does not afford greater protection. In State v. Marsin, 82 Ariz. 1, 307 P.2d 607 (1957), the Arizona Supreme Court stated merely that Article 2, Sec. 10 is consonant with like constitutional provisions found in nearly every state and with the Fifth Amendment. Marsin, certainly does not address the merits of the extent of protection given by the Arizona Constitution. State v. Fendler, 127 Ariz. 464, 622 P.2d 23 (1980) and State v. Superior Court (Gillilard), 149 Ariz. 601, 721 P.2d 149 (1986) are Court of Appeals cases that cannot express the Arizona Supreme Court's interpretation of the Arizona Constitution.

Petitioner also claims that State v. Pierson, 102 Ariz. 90, 425 P.2d 115 (1967) establishes an equivalency between the protection afforded by the statute and the Fifth Amendment protection applied in Griffin v. California. In Pierson the Arizona Supreme Court said only that the previously existing right under A.R.S. Sec. 13-163(B) (now Sec. 13-117) was extended to the level of a constitutional guaranty when Griffin v. California made the Fifth Amendment privilege against self-incrimination applicable to the states through the Fourteenth Amendment. The Arizona Supreme Court did not abandon a previously existing independent state ground by discussing Griffin v. California, and did not create any equivalency of

independent rights.

Contrary to the Petitioner's claim, the Arizona Supreme Court has treated Article 2, Sec. 10, of the Arizona Constitution more expansively than Federal courts have treated the Fifth Amendment. After Michigan v. Long was decided, the Arizona Supreme Court discussed the role of the Arizona Constitution in State v. Mauro, 159 Ariz. 186, 766 P.2d 59 (1988). Like many states after Michigan v. Long, Arizona has indicated clearly and expressly that in construing the State constitution they refer to Federal constitutional law as only the benchmark minimum constitutional protection. The Arizona Supreme Court has reiterated this policy often enough to satisfy Michigan v. Long guidelines and emphasize the independence of the Arizona Constitution.

In State v. Mauro, the Arizona Supreme Court found that in deciding the state constitutional issue, the court is not bound to the analysis and conclusions made by the United States Supreme Court.

The court also discussed this issue in Pool v. Superior Court, 139 Ariz. 98, 677 P.2d 261 (1984), finding that Article 2, Sec. 10 of the Arizona Constitution provided more protection than the U.S. Constitution. The court restated its clear and express intent, which also states the affect of Griffin v. California upon the present case:

> "We would ordinarily interpret art. 2 sec. 10 of the Arizona Constitution...in conformity to the interpretation given by the United States Supreme Court to the same clause in the federal constitution... The decisions of the United States Supreme Court are binding with regard to the interpretation of the federal constitution; interpretion of the state constitution is, of course, our province... We acknowledge, with respect, that decisions of the United States Supreme Court have great weight in interpreting those provisions of the state constitution which cor-

> respond to the federal provisions. We acknowledge that uniformity is desirable. However, the concept of federalism assumes the power, and duty, of independence in interpreting our own organic law. With all deference, therefore, we cannot and should not follow federal precedent blindly." Pool v. Superior Court, 677 P.2d at 271.

The reason for the Arizona Constitution providing greater protection under certain circumstances than the U.S. Constitution was addressed in State v. Hurley, 154 Ariz. 124, 741 P.2d 257 (1987). The court found that differing language or special Arizona traditions or customs may require it to interpret provisions of the Arizona Constitution more expansively than the interpretation given to the federal constitution.

Turning to the opinion of the Arizona Supreme Court in the present case, it is clear that the court utilized Griffin v. California as a persuasive authority, as it considered Barnes v. State, 630 P.2d 1221 (Nev. 1981) and Ex Parte Tucker, 454 So.2d 552 (Ala. 1984).

The Petitioner argues that it is important to stem the tide of misunderstanding before it increases in strength. This position is based upon the incorrect assertion that the Nevada Supreme Court in Barnes v. State and the Alabama Supreme Court in Ex Parte Tucker applied Griffin v. California differently to identical facts. A reading of Ex Parte Tucker shows that the Alabama Supreme Court did not base its decision upon either Griffin v. California or any federal constitutional right. That decision is founded only upon the Alabama constitution and cases interpreting that constitution.

The Arizona Supreme Court's treatment of Ex Parte Tucker clearly and expressly indicates that Griffin v. California was taken only as persuasive authority in a decision based upon independent state grounds. The court was faced with two foreign

state cases, the first based upon the Alabama constitution and the second based upon Griffin v. California and the U.S. Constitution. The court specifically rejected the case discussing Griffin in favor of the case based upon a foreign state's constitution, which was obviously only persuasive authority. The court rejected the Nevada case that limited the right pursuant to Griffin v. California, and held that Arizona independent state grounds are similar to Alabama's, which grant more expansive rights.

A close examination of the Arizona Supreme Court's decision in the present case reveals that it is based upon the independent state grounds contained in Article 2, Sec. 10, of the Arizona Constitution, as well as state statute.

C. THE ARIZONA SUPREME COURT WAS CORRECT IN FINDING THAT THE PROSECUTOR'S COMMENT ON THE DEFENDANT'S ABILITY TO TESTIFY CONSTITUTED FUNDAMENTAL ERROR.

Although the Petitioner frames the issue by stating that the prosecutor did not comment on the defendant's right to testify in the presence of the jury, the reverse is actually true.

The following occurred in the presence of the jury:

> "MR. BEHRENS: Well, Your Honor, I'm merely trying to lay foundation for the excited utterance exception to the hearsay rule.
>
> MR. BREW: Your Honor, I don't believe you can get the communication in the guise of laying the foundation. I think Mr. Ikirt is here." (emphasis added).

This argument occurred following testimony and a hearsay objection by the prosecutor. It does a great disservice to our jury system to suggest that jurors did not understand the meaning of that comment. The prosecutor stated his intent by the statement at a bench conference:

> "THE COURT: You're not going to get that in on excited utterance.

MR. BREW: He had to have an unavailable declarant, Your Honor. He's got an available declarant.

MR. BEHRENS: "I want to specifically object to Mr. Brew's indication that was calculated to indicate to the jury that Mr. Ikirt is here and that that relates to a possible comment upon a failure to take the stand if he chooses to. I therefore move for a mistrial on that basis.

MR. BREW: Your Honor, it's relevant. He's claiming hearsay exception, and we have an available declarant and that's one of the considerations.

THE COURT: Yes. But he, under 803--that is where the declarant is available.

MR. BREW: The only purpose I have making the statement is to indicate the declarant is available." (emphasis added).

The Petitioner argues that the remark was to the judge, not to the jury. The comment was made in the presence of the jury. The plain meaning of the statement was that the Appellant was present, available to testify and should testify, eliminating the need for hearsay from the witness.

In State v. Smith, supra, the Arizona Supreme Court found that effective innuendos raised by the prosecutor will naturally pressure the defendant into taking the stand to rebut the resulting implications. If, on the other hand, the defendant chooses to remain silent, then the very inferences of guilt which the Griffin case expressly sought to avoid are left to mar the trial.

The propriety of the prosecutor's statement must be considered in context. State v. Schrock, 149 Ariz. 433, 719 P.2d 1049 (1986) found that:

"To determine whether a particular agreement is improper, the statement must be examined in context to determine whether the jury would naturally and necessarily

perceive them to be a comment on the failure of the defendant to testify." 719 P.2d at 1054.

The jury must have naturally and necessarily perceived the comment with the prosecutor's intended meaning, which was the innuendo discussed in State v. Smith, supra.

It is true, the pertinent remark occurred during the trial proper rather than at argument. However, it is the character of the remark, and not the time it is made, which is controlling. In this case, the prosecutor's statement--"I think Mr. Ikirt is here"--was designed to mean Mr. Ikirt was present and was available to tell about what happened on May 14, 1984. As the prosecutor candidly admitted at the bench conference, that was precisely his intent. There is no real difference between a prosecutor's argument at the close of the case that a defendant did not testify, and a prosecutor's statement during the trial that a defendant is available and could testify. Both statements improperly shift to the defendant a burden that is not his.

The Petitioner argues that the comment was invited error, that it was a fair response to an evidentiary argument made by the defense counsel.

State v. Christensen, 129 Ariz. 32, 628 P.2d 580 (1981), states that normally a comment regarding a defendant's right to testify constitutes fundamental error unless it was invited.

Invited error occurs when the defendant first brings up the defendant's failure to testify. State v. Arredondo, 111 Ariz. 141, 526 P.2d 163 (1974).

The invited error doctrine provides that where remarks of the prosecuting attorney, even though improper, are invited or occasioned by an accused's counsel, or are in reply to or in retaliation for his acts or statements, they are generally not grounds for reversal. State v. Smith, supra.

In the present case, the defendant's attorney stated, after the prosecutor's objection, that he was attempting to lay a foundation for a hearsay exception. There were no comments regarding the defendant's ability to testify made before the prosecutor's statement. The improper comments cannot be considered invited error.

It is of no moment whether such an improper comment was intentional or accidental. State v. Rhodes, 110 Ariz. 237, 517 P.2d 507 (1974), appeal after remand 112 Ariz. 500, 543 P.2d 1129 (1976).

It is Arizona law that appellate courts should consider 1) whether the remarks called to the attention of the jurors matters that they would not be justified in considering in determining their verdict and 2) the probability that the jurors, under the circumstances of the particular case, were influenced by the remarks. State v. Hallman, 137 Ariz. 31, 668 P.2d 874 (1983).

The Arizona Supreme Court found that under the facts of this case, the prosecutor's comments constituted uninvited fundamental error. The court held that Arizona law mandated a reversal of defendant's conviction. This Court should not disturb such a decision by a State court.

D. THE ARIZONA SUPREME COURT WAS CORRECT IN FINDING THAT THE PROSECUTOR'S COMMENT ON THE DEFENDANT'S ABILITY TO TESTIFY WAS NOT HARMLESS ERROR.

The state's case against Respondent rested entirely upon circumstantial evidence. State v. Ikirt, ____ Ariz. ____, 770 P.2d at 1160 and 1165. Respondent presented an alibi defense in which his mother, a friend, a former deputy marshal and a bar owner testified that Respondent was in Tombstone, Arizona and not at the scene of the arson near the time that the fire was set. Id at 1160. Respondent did not testify at the trial.

The Arizona Supreme Court reviewed the entire record upon Respondent's motion for reconsideration. Id at 1163 (citing A.R.S. Section 13-4035 which mandates such review). Based on that review, the court refused to accept the state's argument that the error in this case was harmless and the case was remanded to the superior court for a new trial. Id at 1165.

Petitioner renews its harmless error argument in this Court, relying on Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). In Chapman, this Court held that an improper comment on a defendant's failure to testify could be harmless only if the reviewing court is able to determine that the error was harmless beyond a reasonable doubt.

In order to make a harmless error determination, the reviewing court must consider the entire record. United States v. Hastings, 461 U.S. 499, 509, n.7, 103 S.Ct. 1974, 1981, n.7, 76 L.Ed.2d 96. While this Court plainly has the authority to decide whether, based on the entire record, a constitutional error[1] was harmless under Chapman, this Court does so sparingly. Id at 510, 103 S.Ct., at 1981.

This Court is in precisely the position of the court below in addressing the issue of harmless error. See, Id at 509, n.8, 103 S.Ct., at 1981, n.8. This Court customarily accords great weight to a state court's findings in matters, such as the present one, which is largely based upon factual determinations. See, e.g., Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum,

[1]Respondent in no way concedes that the error in this case was constitutional rather than a violation of the Arizona statute. However, if this Court reaches the Chapman analysis, a constitutional error must have occurred.

Inc., 445 U.S. 97, 100 S.Ct. 937, 33 L.Ed.2d 233 (1980). This case should be viewed with this consideration in mind.

The present case is similar to Eberhardt v. Bordenkircher, 605 F.2d 275 (6th Cir. 1979). Eberhardt involved an improper comment on a defendant's failure to testify in a case based largely, though not exclusively, on circumstantial evidence in which the defendant presented an alibi defense. The Eberhardt court focused on several factors, germane to the current analysis, in finding that the error in that case was not harmless. Those factors are set forth below in the analysis of the present case.

The first factor involves the strength of the state's case. Here, the state's case was based entirely on circumstantial evidence. This fact alone strongly indicates that any error should not be considered harmless. See, Fontaine v. California, 390 U.S. 393, 88 S.Ct. 1229, 20 L.Ed.2d 154 (1968); Berryman v. Colbert, 538 F.2d 1247 (6th Cir. 1976).

A second related factor is whether the state's case was undisputed. Here, as in Eberhardt, the defendant's alibi defense, "though far from undisputable, was consistent and credible enough that it might have been accepted by a reasonable juror, absent the prosecutor's improper remarks." Eberhardt at 280. This factor also indicates that the present error was not harmless.

Another factor is whether the error could reasonably be viewed as eradicated by the rulings and instructions of the trial court. In the present case, as in Eberhardt, the trial court "did not give a strong, prompt instruction to the jury, explaining the defendant's right not to testify and admonishing it to disregard the prosecutor's comments." Eberhardt at 280. Instead, the trial court merely denied the motion for mistrial

and the trial continued. This is another indication that the error was not harmless.

A fourth factor to consider is whether the trial was otherwise relatively error-free. In the present case, there were numerous errors other than the improper comment error. The Arizona Court of Appeals reversed Petitoner's conviction because the trial court improperly admitted evidence of a witness' refusal to submit to a polygraph examination and did not rule on other errors raised on appeal. See, Ikirt at 1161-1162. The Arizona Supreme Court ruled that the polygraph issue was waived but later reversed because of the improper comment. Neither court reached the other errors raised in the appeal.

The cumulative effect of these errors is a proper factor to be weighed in the harmless error balance. Eberhardt at 280. This factor also indicates that the present error was not harmless.

In the present case, as in Eberhardt, the only factor weighing in favor of a finding of harmless error is the fact that the prosecutor's comments were relatively brief and not repeated. However, it only takes a single comment "to remind a jury that the defendant has not testified and to fix in the jurors' minds the impermissible inference that the defendant is guilty merely because of the exercise of that right." Eberhardt at 279 (citing Rachel v. Bordenkircher, 590 F.2d 200 (6th Cir. 1978).

The Arizona Supreme Court ruled that the prosecutor's comment in the present case was prejudicial and entitled Petitioner to a new trial. The Arizona court's holding is amply supported by the record under review. That court's findings should be given great weight. It must be fairly said that there is a reasonable possibility that the prosecutor's improper comment contributed to the jury's verdict. Therefore, this Court

should find that the state failed to carry its heavy burden of demonstrating that the constitutional error in this case was harmless beyond a reasonable doubt under Chapman.

CONCLUSION

The Court should deny the Petition for Writ of Certiorari in that the Arizona Supreme Court's decision is clearly and expressly based upon independent state grounds. Those independent state grounds are A.R.S. Sec. 117(B) and Article 2, Section 10 of the Arizona Constitution, both of which predate Griffin v. California.

In addition, this Court should deny the Petition for Writ of Certiorari for the reason that the prosecutor's comment upon the defendant's ability to testify clearly constituted fundamental error. The Arizona Supreme Court was correct in finding that the fundamental error was not harmless under the circumstances of this case.

RESPECTFULLY SUBMITTED this 9 day of June, 1989.

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Supreme Court, U.S.
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NO. 88-1844

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

THE STATE OF ARIZONA, Petitioner,

vs.

JEFFREY LYNN IKIRT, Respondent.

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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JURISDICTIONAL QUESTION

In striving to convince this Court that it lacks jurisdiction over this case, Respondent seems to have missed the point of Michigan v. Long, 463 U.S. 1032 (1983). Whether a state statutory or constitutional provision exists that may be "sufficient" to support the state court's holding (Brief in Opposition at 9, 10), or whether such state authorities were even referred to in the questioned decision, is basically irrelevant. The rule of Long is that, unless the state court decision clearly and explicitly relies on those potentially jurisdiction-depriving state provisions, this Court does have jurisdiction over the case.

> [W]hen, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the fact of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions,

> then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached... If the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, we, of course, will not undertake to review the decision.

(463 U.S. at 1040-41.)

The Arizona Supreme Court's decision in this case certainly does "fairly appear to rest primarily on federal law". The most direct statement of the holding relies exclusively on this Court's decision in Griffin v. California, 380 U.S. 609 (1965):

> We have concluded that the case must be reversed because the prosecutor improperly commented on the defendant's failure to testify. Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965).

(Appendix 2 to the Petition, Reproduced Slip Op. at 5.) Similarly, in characterizing Ikirt's claim, the Arizona Supreme Court said:

> Relying on Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965), the defendant contends that the prosecutor's comment

> violates his fifth amendment right against self-incrimination. In Griffin, the United States Supreme Court held that any comments by a prosecutor about the failure of the defendant to testify violates a defendant's right against self-incrimination.

(Id. at 7.) There is no "plain statement in its judgment that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached." This decision does not "indicate clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds;" if it did, the Brief in Opposition would not need to expend nine legal-size pages trying to demonstrate that it does. Thus, the Brief in Opposition actually tends to prove the existence of this Court's jurisdiction in this case.

Pool v. Superior Court, 139 Ariz. 98, 677 P.2d 261 (1984), cited by the Brief in Opposition at 13-14, is not as applicable as Respondent would have this Court believe, because Pool was concerned with the double

jeopardy portion of Arizona Constitution Art. 2 § 10, rather than the right to silence provision. However, what Pool and the other cases cited on pages 13-14 of the Brief in Opposition do prove, as does State v. Ault, 150 Ariz. 459, 466, 724 P.2d 545, 552 (1986), is that when it really desires to do so, the Arizona Supreme Court knows exactly how to comply with Long. As this Court observed in Harris v. Reed, ___ U.S. ___, 109 S.Ct. 1038, 1044 (1989), "state courts have become familiar with the 'plain statement' requirement under Long and Caldwell." Armed with such proven familiarity, the Arizona Supreme Court did not even attempt in this case to give the sort of "plain statement" required by Long, so this Court certainly does have jurisdiction. "[A]mbiguous or obscure adjudications by state courts do not stand as barriers to a determination by this Court of the validity under the federal constitution of state action." Minnesota v. National Tea Co., 309 U.S. 551, 557 (1940), quoted approvingly in Michigan v. Long, 463

U.S. at 1041.

ARGUMENTS ON THE MERITS

I.

THERE WAS NO VIOLATION OF GRIFFIN V. CALIFORNIA, 380 U.S. 609 (1965), IN THIS CASE.

Consistent with its erroneous view that the Arizona Supreme Court based the decision in this case on independent state grounds, the Brief in Opposition abjures all discussion of Griffin v. California. This tactic permits Respondent to evade acknowledgment of the fact that this Court has so strictly circumscribed the Griffin doctrine that it cannot reasonably be applied to the circumstances of this case, but that fact nonetheless exists. See the Petition at 4-13.

Griffin's holding was that the Fifth Amendment "forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." (380 U.S. at 615.) Here the prosecutor merely remarked to the judge that the defendant was present, in the course of a convoluted discussion of the

applicability of the hearsay rule, after the jury had been instructed that lawyer talk is not evidence, and that evidentiary rulings were not matters for their concern. (R.T. Vol. II. at 58-59, 61.) Only by the most tenuous extrapolation of inferences upon inferences is it possible to conjure up some shadowy suggestion that Ikirt might not take the witness stand (the defense case not yet having concluded), and that if he did not testify the jury should read something into that failure because of what the prosecutor was discussing with the judge (despite their specific instructions not to pay attention to such discussions), and that if they read something into the still hypothetical failure to testify, it should be that the defendant was tacitly acknowledging his guilt (even though they had all agreed under oath during voir dire that the defendant is free not to testify, and that his failure to take the witness stand cannot be held against him -- R.T. Vol. II. at 39-41).

The "reasoning" would be laughable were

the situation not so serious -- the highest court of a state, sadly misconstruing a clear holding of this Court, to free a man fairly convicted of an extremely serious and potentially dangerous crime. Not only should this Court grant certiorari to correct this misinterpretation of Griffin, but the simplicity of the circumstances and the blatancy of the error suggest that a summary reversal of the Arizona Supreme Court would not be inappropriate.

II.

IT IS DENIED THAT ANY ERROR OCCURRED HERE, BUT IF ERROR THERE WAS, IT CERTAINLY WAS HARMLESS BEYOND A REASONABLE DOUBT.

The Brief in Opposition, relying on Eberhardt v. Bordenkircher, 605 F.2d 275 (6th Cir. 1979), seeks to argue that the claimed error could not be harmless, but the analysis is totally unconvincing. Ikirt's alibi defense was not credible, because every one of the defense witnesses who testified about him being someplace other than the crime scene was completely impeached, and because Ikirt not

once but repeatedly made admissions that were legitimately received into evidence. (See Petition at 26-29.) Thus, this was not a case based entirely on circumstantial evidence, and in any event, the allegedly improper remark was so innocuous that it could not possibly have affected the outcome.

The Brief in Opposition makes much of the absence in this case of a strong curative instruction, but that lies at the door of the defense, which rejected the trial court's offer to give such an instruction. (R.T. Vol. VIII. at 29-30.) Moreover, no other errors have been held cognizable in the Arizona courts or even described to this Court. The Brief in Opposition wants this Court to buy a legal "pig in a poke" by ruling that an innocuous alleged error is harmful because of other errors that have not even been specified to you! If we want to cumulate factors, 0 + 0 = 0. Indeed, the facts of Eberhardt are extreme and so different from those in this case (including pointing at the defendant and asking who else could have testified), that

it is easily distinguishable -- as the Sixth Circuit itself noted in Butler v. Rose, 686 F.2d 1163, 1175 (6th Cir. 1982). It certainly does not require the conclusion that the "error" alleged here was harmful.

CONCLUSION

It is denied that what occurred here was a Griffin error. Assuming arguendo that it somehow is deemed to have been error, the prosecutor's remark certainly was harmless beyond a reasonable doubt. Therefore, no matter how the case is approached, certiorari should be granted and the decision of the Arizona Supreme Court should be reversed.

RESPECTFULLY SUBMITTED,

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